84-1705 (1)

No. _____

Office-Supreme Court, U.S.
FILED
MAY 1 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PRESTRESS ENGINEERING CORPORATION,
Petitioner,

vs.

JOSE ISABEL GONZALEZ and JOHN REPYAK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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May 2, 1985

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95pp

QUESTION PRESENTED FOR REVIEW

The question presented for review is whether federal labor law prohibits a state tort suit by a union employee against his employer for retaliatory discharge when (1) the employee was protected by a collective bargaining agreement requiring "just cause" for discharge and containing a grievance procedure culminating in final and binding arbitration and (2) the employee made no attempt to pursue or exhaust the grievance procedure.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF ILLINOIS

The petitioner, Prestress Engineering Corporation, by its atttorneys, McDermott, Will & Emery, prays that a writ of certiorari issue to review the decision of the Supreme Court of Illinois entered on October 10, 1984, as modified on

denial of rehearing on February 1, 1985.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (App. at A-3, A-15) is reported at 105 Ill. 2d 143, 473 N.E. 2d 1280 (1984) under the name Midgett v. Sackett-Chicago, Inc., a case consolidated with the instant cases by the Supreme Court of Illinois. The opinions of the Circuit Court of the Eleventh Judicial Circuit, Livingston County, Illinois and the Appellate Court of Illinois, Fourth District are unpublished but are set forth in the Appendix. (App. at A-40)[1/]

1/ The petitioner, Prestress Engineering Corporation, is an operating division of Road Materials Corporation which is a subsidiary of E. M. Melahn Construction Company. Other subsidiaries of E. M. Melahn Construction Company are Giertz Melahn Asphalt Company, Inc., Suburban Ready Mix Company, and Standard Ready Mix Company.

JURISDICTION

The opinion of the Supreme Court of Illinois was filed on October 10, 1984. (App. at A-15). Petitioner filed a timely petition for rehearing on November 9, 1984. On February 1, 1985, the court denied rehearing but inserted a new paragraph into the opinion. (App. at A-3) Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

STATUTES INVOLVED

The provisions of the Labor Management Relations Act involved in this case, 29 U.S.C. §141, 151, 171, 173(d), 185(a), are set forth in the Appendix. (App. at A-65)

STATEMENT OF THE CASE

The Supreme Court of Illinois, in a four to three decision, held that a union employee may file a tort suit for retaliatory discharge without pursuing or exhausting the grievance and arbitration procedure in the collective bargaining

agreement. Petitioner argued that allowing a tort suit with no requirement that an employee exhaust the grievance and arbitration procedure violates federal labor law. The Supreme Court of Illinois responded, "The argument is unconvincing. We cannot see any perceptible effect on the use of arbitration." (App. at A-26)

I. Facts

Both respondents (hereinafter referred to as the "employees"), Jose Isabel Gonzalez and John Repyak, were employed by petitioner (hereinafter referred to as the "employer") as general factory laborers. Each filed suit in the Circuit Court of the Eleventh Judicial Circuit, Livingston County, Illinois, alleging that his employment was terminated because he exercised his rights under the Illinois Workers' Compensation Act, Ill. Rev. Stat. ch. 48, §138.1 et seq., by filing a claim with the Illinois Industrial Commission.

The employees were members of a bargaining unit of production and maintenance employees represented by a union, the North Central Illinois Laborers' District Council on behalf of Laborer's Local No. 996 (hereinafter referred to as the "union"). The union and the employer were parties to a collective bargaining agreement requiring "just cause" for discharge. The agreement broadly defined a grievance as "a difference of opinion between the company and an employee covered by this agreement with respect to the meaning and application of a term or terms of this agreement." A five step grievance procedure in the collective bargaining agreement culminated in final and binding arbitration. Neither employee filed a grievance. Instead, each employee filed suit alleging retaliatory discharge and seeking actual and punitive damages.

II. Federal Questions Raised Below and the Court Decisions

The employer filed motions to dismiss both

cases, on grounds, among others, that the court lacked subject matter jurisdiction of the actions because the employees failed to exhaust their remedies under the collective bargaining agreement. In its memoranda in support of the motions to dismiss, the employer argued that permitting the employees to pursue their tort claims would conflict with federal labor law's reliance on the grievance and arbitration procedure as a dispute resolving mechanism. The trial court dismissed both cases, finding as a matter of law that plaintiffs' failure to file grievances under the collective bargaining agreement barred their claims. (App. at A-47, A-50)

The employees appealed to the Appellate Court of Illinois, Fourth Judicial District. Again, the employer argued that federal labor law mandated an exhaustion requirement. (App. at A-60) The appellate court unanimously affirmed the trial court's dismissal, holding that the employees were required to pursue the grievance

procedure in the collective bargaining agreement to determine if "just cause" existed for their discharges. (App. at A-43)

The employees filed a petition for leave to appeal to the Supreme Court of Illinois which the court granted. Despite the employer's arguments that federal labor policy precluded an employee from bypassing the grievance and arbitration procedure, the court allowed the employees to pursue their retaliatory discharge claims. By implication, the court permitted the tort suits with no requirement of exhausting the grievance procedure. The court based its decision on state public policy prohibiting retaliatory discharge and the necessity of allowing a union employee punitive damages. (App. at A-23)

The three dissenting justices stressed that the majority's opinion, allowing a union employee to file suit without exhausting the grievance procedure, undermines the collective bargaining agreement. (App. at A-35) Reasoning that em-

ployees should not be allowed to "circumvent the mutually agreed upon grievance procedures," the dissent argued that an employee should be allowed a civil tort action only if he exhausted the grievance procedure and the arbitrator found a retaliatory motive for the discharge. (App. at A-35)

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION FOR CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE ILLINOIS SUPREME COURT DECISION AND FEDERAL LABOR LAW

The decision of the Supreme Court of Illinois contravenes federal labor law, and the Court should grant the petition for certiorari in order to resolve a significant conflict between that decision and federal labor law. The Illinois Supreme Court's decision in this case allows a union employee to completely bypass the grievance and arbitration procedure in a collective bargaining agreement by framing his complaint as a

tort suit for retaliatory discharge. This approach eviscerates a cornerstone of federal labor policy, the grievance and arbitration procedure.

In addition, the Illinois Supreme Court's decision conflicts with decisions of other state supreme courts, with federal appellate court decisions, and with the principles recently enunciated by this Court in Allis-Chalmers Corp. v. Lueck, 45 CCH S. Ct. Bull. P. B2352 (No. 83-1748, April 16, 1985). The highest state courts in Arizona, Minnesota, and Vermont have held that the grievance and arbitration procedure in a bargaining agreement provides the exclusive means of redress for wrongful or retaliatory discharge, whether the employee couches his suit as a breach of contract or a tort action. 2/ Burkhart v.

2/ Texas has adopted the position that although an employee need not exhaust the grievance procedure, an arbitration award adverse to the employee precludes a subsequent civil suit. Richards v. Hughes Tool Co., 615 S.W. 2d 196, 197 (Tex. Sup. Ct. 1981), cert.

(footnote continued on next page)

Mobil Oil Corp. 143 Vt. 123, 463 A.2d 226 (1983) (claimed breach of oral contract of employment barred by failure to exhaust grievance procedure); Payne v. Pennzoil Corp., 138 Ariz. 52, 672 P.2d 1322 (1983)(collective bargaining agreement provided exclusive remedy for allegedly wrongful discharge for filing workers' compensation claim); Davis v. Boise Cascade Corp., 288 N.W.2d 680 (Minn. Sup. Ct. 1979) (employee claiming discharge in retaliation for complaining about ventilation restricted to remedies under collective bargaining agreement).

A number of United States Courts of Appeal

2/ denied, 456 U.S. 991 (1982), citing Thompson v. Monsanto Co., 559 S.W.2d 873 (Tex. Civ. App. 1977). The Oregon and Hawaii supreme courts have allowed union employees to bypass the grievance procedure and maintain civil suits for retaliatory discharge. Puchert v. Agsalud, ____ Hawaii ____, 677 P.2d 449 (1984), petition for cert. filed, 52 U.S.L.W. 3908 (May 25, 1984) (No. 83-1952); Vaughn v. Pacific Northwest Bell Telephone Co., 289 Or. 73, 611 P.2d 281 (1980).

also have held that a union employee cannot escape the exclusivity of the grievance and arbitration procedure in a collective bargaining agreement by casting his claim as a tort. 3/ E.g., Olguin v. Inspiration Consolidated Copper Co., 740 F.2d 1468 (9th Cir. 1984)(tort of wrongful discharge supplanted by provisions of collective bargaining agreement); Bertrand v. Quincy Market Cold Storage & Warehouse Co., 728 F.2d 100 (1st Cir. 1984)(tort claim for wrongful discharge must be submitted to the grievance and arbitration procedure); Jackson v. Consolidated Rail Corp., 717 F.2d 1045 (7th Cir. 1983), cert. denied, 104 S. Ct. 1000 (1984)(wrongful discharge tort claim preempted by Railway Labor Act); Lamb

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3/ Other federal appellate courts have reached a contrary conclusion. E.g., Garibaldi v. Lucky Foods Stores, Inc., 726 F.2d 1367 (9th Cir. 1984)(wrongful discharge suit not preempted by federal law); Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981) (employee claiming wrongful discharge not restricted to arbitration remedy).

v. Briggs Manufacturing, 700 F.2d 1092 (7th Cir.1983)(retaliatory discharge claim barred by grievance and arbitration procedure); Viestenz v. Fleming Companies, Inc., 681 F.2d 699 (10th Cir.), cert. denied, 459 U.S. 972 (1982) (wrongful discharge claim barred by employee's failure to utilize grievance procedure).

The Illinois Supreme Court's decision in the instant case conflicts with the principles enunciated by this Court in Allis-Chalmers v. Lueck, 45 CCH S. Ct. Bull. P. B2352 (No. 83-1748, April 16, 1985). In Allis-Chalmers, the Court held that when the resolution of a state tort claim depends upon analysis of the collective bargaining agreement, the claim must either be treated as a breach of contract suit under section 301 of the Labor Management Relations Act, 29 U.S.C. §185(a), or dismissed as preempted by federal law. Id. at B2371.

The employee's claim in Allis-Chalmers was based solely on a provision in the collective

bargaining agreement providing for disability benefits. In the instant case, the employees' claims are cognizable under the collective bargaining agreement's "just cause" for discharge provision. The existence of a state public policy prohibiting discharge in retaliation for filing a workers' compensation claim does not alter the coverage of these claims by the collective bargaining agreement, and the principles set forth in Allis-Chalmers are equally applicable here.

The employees' retaliatory discharge suits could have been pleaded as breach of contract claims under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), just as the Allis-Chalmers claim could have been pleaded. Like the state court decision in Allis-Chalmers, the Illinois Supreme Court's decision allows a tort suit without exhaustion of the grievance procedure. Ultimately, this approach will cause arbitration to "lose most of its effectiveness."

Allis-Chalmers at B2370. According to this Court's holding in Allis-Chalmers, these complaints should have been dismissed for failure to utilize the grievance procedure in the collective bargaining agreement or dismissed as preempted by section 301. Id. at B2371.

II. FAILURE TO REQUIRE EXHAUSTION OF THE GRIEVANCE PROCEDURE CONFLICTS WITH FEDERAL LABOR LAW

The Illinois Supreme Court's decision, based on state public policy considerations, violates principles of federal labor law. Under these circumstances, "incompatible doctrines of local law must give way to principles of federal labor law." Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 102 (1962). Issues raised in suits "of a kind" covered by section 301 of the Labor Management Relations Act, 29 U.S.C. §185(a), must be decided in accordance with principles of federal labor policy. Id. at 103. These employees' retaliatory discharge suits are "of a kind" cov-

ered by section 301, and the outcome must comport with federal law.

Allowing the employees to file suit in the first instance violates a well established tenet of federal labor law that an employee must at least attempt to utilize the grievance procedure under the collective bargaining agreement. Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965).[4/] The grievance procedure in the collective bargaining agreement "is at the very heart of the system of industrial self-government". United Steelworkers v. Warrior & Gulf Navigation Corp., 363 U.S. 574, 581 (1960). Processing disputes under the grievance procedure

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4/ The purpose of the Labor Management Relations Act, to facilitate interstate commerce by eliminating industrial strife, is achieved by creating peaceful and orderly dispute resolution procedures. 29 U.S.C. § 141, 151. The Act relies heavily on collective bargaining, id. at § 171, and resolution of grievances according to the method selected by the parties to eliminate industrial strife. Id. at § 173.

is the vehicle which provides "meaning and content" to the collective bargaining agreement. Id. A rule which permits an employee to circumvent the grievance procedure and proceed directly to court denigrates the grievance procedure. See Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). Inevitably, this will exert a disruptive influence on the negotiation and administration of collective bargaining agreements. Id. at 653, quoting Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 103 (1962).

The decision of the Supreme Court of Illinois will emasculate federal labor law's reliance on collective bargaining and the grievance and arbitration procedure. By allowing an employee to bypass the grievance procedure, the court paved the way for the grievance procedure to become an extinct mechanism for resolving employee discharges. According to the court's holding, an employee could proceed directly to court without attempting to utilize the grievance proce-

dure, merely by alleging his discharge violated some public policy.

Given the growing popularity of "wrongful" or "retaliatory" discharge suits, massive numbers of discharge cases will be heard by the courts in the first instance, not by the person selected by the union and the employer to resolve contract disputes, the labor arbitrator. "A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness." Allis-Chalmers v. Lueck, 45 CCH S. Ct. Bull. P. at B2370, citing Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965). In addition, it would violate long established principles of federal labor law that require an employee to pursue the grievance and arbitration procedure. Under these circumstances, state law must yield to federal labor law.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted to review the decision of the Supreme Court of Illinois.

Respectfully submitted,

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APPENDIX

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59341
59350 Cons.

ILLINOIS SUPREME COURT
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February 1, 1985

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Nos. 59341 - Terry Midgett, et al., etc., appel-
59350 lees, v. Sackett-Chicago, Inc., et
Cons. al., etc., appellants. Appeal, Ap-
pellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause. Miller, J., took no part.

The mandate of this Court will issue to the appropriate Appellate Court, Circuit Court or other Agency on February 8, 1985.

Attached please find new pages to the opinion.

a strong public policy to insure the protection of workers covered by the Workers' Compensation Act is clear. Section 6 of the Act (Ill. Rev. Stat. 1981, ch. 48, par. 138.6) requires employers to post printed notices containing information concerning the Act which is necessary to aid employees to safeguard their rights under the Act in the event of injury. Employers are required to file reports of injuries and other matters with the Commission, and the failure to do so constitutes a petty offense. Section 26 (Ill. Rev. Stat. 1981, ch. 48, par. 138.26) provides that in the event of any violation of the Act, which is declared to be a petty offense, the Attorney General and the State's Attorney of each county, upon the request of the Industrial Commission, shall enforce the penalties prescribed in the Act.)

The defendants argue that if union employees are allowed the tort action recognized in Kelsay, it would be violative of the Federal labor-law policy for industrial stability through the use of arbitration in union agreements. The argument is unconvicing. We cannot see any perceptible effect on the use of arbitration. There is an important public interest in protecting the rights of workers under the Act, and in deterring unscrupulous employers from discharging employees. The appellate court observed in Midgett:

> "[T]he recognition of a cause of action in tort merely allows an employee an additional remedy in areas where strong public policies, as opposed to purely private interests, are involved. Such an alternative is especially necessary and desirable in a case such as this where there has been an allegation of collusion between the union and the employer." Midgett v. Sackett-Chicago, Inc. (1983), 118 Ill. App. 3d 7, 9.

In light of defendants' argument regarding a Federal policy favoring arbitration, it is interesting to note that the Supreme Court has

allowed employees, covered under a collective-bargaining agreement with an arbitration provision, to bring claims against employers that are founded upon violations of Federal statutory rights, such as violations of civil rights (McDonald v. City of West Branch (1984), ____ U.S. ____ 80 L. Ed 2d 302, 104 S. Ct. 1799), racial discrimination (Alexander v. Gardner-Denver Co. (1974), 415 U.S. 36, 39 L. Ed 2d 147, 94 S. Ct. 1011), and violations of the Fair Labor Standards Act (Barrentine v. Arkansas-Best Freight System, Inc. (1981), 450 U.S. 782, 67 L. Ed 2d 641, 101 S. Ct. 1437).

Paragraph inserted

Sackett contends that Midgett's complaint was properly

a strong public policy to insure the protection of workers covered by the Workers' Compensation Act is clear. Section 6 of the Act (Ill. Rev. Stat. 1981, ch. 48, par. 138.6) requires employers to post printed notices containing information concerning the Act which is necessary to aid employees to safeguard their rights under the Act in the event of injury. Employers are required to file reports of injuries and other matters with the Commission, and the failure to do so constitutes a petty offense. Section 26 (Ill. Rev. Stat. 1981, ch. 48, par. 138.26) provides that in the event of any violation of the Act, which is declared to be a petty offense, the Attorney General and the State's Attorney of each county, upon the request of the Industrial Commission, shall enforce the penalties pre-

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Sent 1/31/85

Our conclusion that employees like the ones here are not limited to contractual remedies available under collective-bargaining agreements has been reached in other jurisdictions. See Puchert v. Agsalud (1984), ___ Hawaii ___, 677 P.2d 449; Peabody Galion v. Dollar (10th Cir. 1981), 666 F.2d 1309; Carnation Co. v. Borner (Tex. 1980), 610 S.W.2d 450; Vaughn v. Pacific Northwest Bell Telephone Co. (1980), 289 Or. 73, 85-89, 611 P.2d 281, 287-90; Judson Steel Corp. v. Workers' Compensation Appeals Board (1978), 22 Cal. 3d 658, 586 P.2d 564, 150 Cal. Rptr. 250.

Sackett contends that Midgett's complaint was properly dismissed because he alleged no facts in his supporting affidavits, such as the exhaustion of grievance procedures, to sustain a cause of action. A plaintiff, however, need not

plead the exhaustion of contract remedies to bring an action in tort. As was stated in Palmateer, the plaintiff must allege a retaliatory discharge and that the discharge violated a clear public policy. Midgett did this, and thus a cause of action was stated. Midgett, however, did not appeal the dismissal of his wife and children as plaintiffs. Those portions of the appellate and circuit court judgments dismissing them as party plaintiffs are, thus, to be left undisturbed.

John Repyak and his wife claim that, due to his discharge, they have an independent cause of action to recover his pension rights which were lost upon his discharge, which occurred one year and four months before they would have vested. Their complaint, however, alleges that Repyak

was discharged because he filed a workers' compensation claim and not because the employer wished to defeat his pension rights. The loss of pension rights would be a consequence of his discharge, and he may allege it as an element of damages in a retaliatory-discharge action against his employer.

Prestress, in cause No. 59350, filed a motion in this court to strike certain documents in Gonzalez' brief and the references to them, which motion was taken with the case. The documents in question were not made part of the record on appeal. Too, they were not before the trial court or the appellate court, and Prestress' motion to strike is allowed.

Midgett also filed a motion to strike portions of defendant Sackett's brief. This motion

was also taken with the case. Midgett argues that those portions of the brief raise issues which were not raised in the trial court or in the appellate court and that Sackett has waived those issues for review here. After reviewing Sackett's briefs, we have determined that Sackett did not earlier raise the issue of Federal pre-emption. We therefore allow Midgett's motion to strike as to the portion of the brief discussing this issue.

For the reasons given, the judgment of the appellate court in cause No. 59341 is affirmed; the judgment of the appellate court and the judgments of the circuit court of Livingston County in cause No. 59350 are reversed and the causes are remanded to the circuit court for proceedings consistent with this opinion.

Sent 1/31/85

59341 Midgett v. Sackett-Chicago, Inc.

59341 - Judgment affirmed.

59350 - Judgments reversed;

caused remanded.

Sent 1/31/85

Docket Nos. 59341, 59350 cons. Agenda 40 -- May 1984.

TERRY MIDGETT et al., Appellees, v. SACKETT-CHICAGO, INC., et al., Appellants, -- JOSE ISABEL GONZALEZ, Appellant, v. PRESTRESS ENGINEERING CORPORATION, Appellee.

JUSTICE WARD delivered the opinion of the court:

These consolidated appeals concern the question of claimed retaliatory discharges of employees. The plaintiff in cause No. 59341, Terry Midgett, filed a complaint in the circuit court of Cook County alleging that he was unjustly discharged by his employer, Sackett-Chicago, in retaliation for his filing a claim with the Industrial Commission under the Workers' Compensation Act (the Act) (Ill. Rev. Stat. 1981, ch. 48, par. 138.1 et seq.). Jose Gonzalez and John Repyak, plaintiffs in cause No. 59350, filed separate complaints in the circuit court of Livingston

County alleging that their employer, Prestress Engineering, discharged them in retaliation for their filing workers' compensation claims under the Act. In all three cases the trial courts granted the employers' motions to dismiss the complaints for failure to state a cause of action. The appellate court in the fourth district consolidated the Gonzalez and Repyak appeals and in a Rule 23 order (87 Ill. 2d R. 23) affirmed the trial courts' dismissal of each complaint. (Gonzalez v. Prestress Engineering Corp. (1983), 118 Ill. App. 3d 1167.) The appellate court in the first district, however, reversed the trial court in Midgett, holding that a cause of action was stated. (Midgett v. Sackett-Chicago (1983), 118 Ill. App. 3d 7.) We allowed a petition of Gonzalez and Repyak for leave to appeal from the fourth district judgment in Gonzalez (cause No. 59350) and allowed the petition of the defendant Sackett-Chicago for leave to appeal from the first district judgment in Midgett (cause

No. 59341), under our Rule 315 (87 Ill. 2d R. 315). The appeals were consolidated for review.

In cause No. 59341 Terry Midgett, who was injured on January 31, 1979, in the course of his employment with Sackett-Chicago, filed a workers' compensation claim with the Industrial Commission. The claim was still pending when Midgett was discharged from his employment by Sackett in January 1980. Sackett reached a settlement of the claim with Midgett in August 1980. On December 31, 1980, Midgett, claiming a retaliatory discharge, filed an action in tort in his own name and on behalf of his wife and minor children, seeking compensatory and punitive damages against Sackett. Sackett moved to dismiss, stating that Midgett was a union member covered by a collective-bargaining agreement with specific grievance provisions for the arbitration of disputes, under which an arbitrator would determine if a discharge from employment

was for "just cause." Sackett argued that Midgett, who had not filed a grievance, was limited to contract remedies under the agreement and had no cause of action in tort. Midgett filed cross-motions that in part alleged that the union and Sackett had prevented Midgett from filing a grievance for his discharge. The trial court dismissed Midgett's complaint.

In cause No. 59350 Gonzalez, in August 1981, filed a workers' compensation claim after suffering an injury while employed by Prestress Engineering. On August 23, 1982, an Industrial Commission arbitrator denied compensation on the ground that plaintiff's injury did not arise out of and in the course of his employment. Gonzalez was discharged on September 20, 1982, and he later filed his tort claim for retaliatory discharge against Prestress.

Plaintiff Repyak was also injured at defendant Prestress' plant and in July 1981 was awarded certain benefits under the Workers' Com-

pensation Act. His employment by Prestress was terminated October 6, 1982, and he, too, filed a retaliatory-discharge action against Prestress. Repyak alleged in count II of his complaint that he and his wife, Elsie Repyak, were denied pension benefits because of his discharge approximately one year before his pension vested. Both employees were union members and were covered by a collective-bargaining agreement between the local and Prestress, with grievance procedures requiring "just cause" for an employee's discharge. Neither Gonzalez nor Repyak filed a grievance against the employer. The motions of Prestress to dismiss the complaints were granted.

The appellate court in the fourth district affirmed the Gonzalez and Repyak dismissals (118 Ill. App. 3d 1167), reasoning that, since the plaintiffs were union members protected by the collective-bargaining agreement and not employees at will, they could not bring a cause of action for retaliatory discharge as described in

Kelsay v. Motorola, Inc. (1978), 74 Ill. 2d 172. Instead they were required to pursue and exhaust their grievance remedies under the agreement. The appellate court in the first district, in reversing the dismissal of Midgett's complaint (118 Ill. App. 3d 7), held that the tort of retaliatory discharge extended to union employees covered by such a collective-bargaining agreement in order to promote the strong public policy to favor protection of employees who exercise their rights under the Act, whether the employees are members of a union or not.

In Kelsay v. Motorola, Inc. (1978), 74 Ill. 2d 172, this court held there was a remedy in tort for employees who were discharged in retaliation for filing workers' compensation claims. Otherwise employers could coerce employees to forgo their rights under the Act by threatening to terminate, or by actually discharging, employees who claimed compensation for industrial

injuries. This remedy implements the public policy underlying the Act of providing employees an effective and equitable means to seek compensation for injuries sustained in the course of their employment without fear or risk of losing their jobs. In Palmateer v. International Harvester Co. (1981), 85 Ill. 2d 124, an employee was terminated for informing police of suspected criminal activities of his co-workers. In holding that the tort of retaliatory discharge was applicable we stated:

> "The foundation of the tort of retaliatory discharge lies in the protection of public policy, and there is a clear public policy favoring investigation and prosecution of criminal offenses.
>
> * * *
>
> All that is required [to bring a cause of action] is that the employer discharge the employee in retaliation for the employee's activities, and that the discharge be in contravention of a clearly mandated public policy." 85 Ill. 2d 124, 133-34.

The defendants here, however, argue that the action for retaliatory discharge was created

to protect only "at-will" employees, such as those involved in Kelsay and Palmateer, who would otherwise be without a remedy for a vengeful discharge. The plaintiffs here are not "at-will" employees but are union members, protected by collective-bargaining agreements which provide specific grievance procedures to ensure discharge from employment only for "just cause." Since the plaintiffs here have a remedy through the union agreement, the defendants argue that the rationale in Kelsay is not involved and that the dismissal of plaintiffs' complaints was proper. The defendants cite other decisions of the appellate court that support their argument: Mouser v. Granite City Steel Division of National Steel Corp. (1984), 121 Ill. App. 3d 834; Suddreth v. Caterpillar Tractor Co. (1983), 114 Ill. App. 3d 396; Deatrick v. Funk Seeds International (1982), 109 Ill. App. 3d 998; Cook v. Caterpillar Tractor Co. (1980), 85 Ill. App. 3d 402.

Emphasizing that the employees in Kelsay and Palmateer were at-will employees, they cite, too, Lamb v. Briggs Manufacturing (7th Cir. 1983), 700 F.2d 1092, which held that union employees under collective-bargaining agreements could not maintain an action for retaliatory discharge. We consider, however, that in order to provide a complete remedy it is necessary that the victim of a retaliatory discharge be given an action in tort, independent of any contract remedy the employee may have based on the collective-bargaining agreement. In Kelsay, an essential factor in providing the action for retaliatory discharge was a recognition of the importance of permitting the allowance of punitive damages against the offending employer. This court stated:

> "In the absence of the deterrent effect of punitive damages there would be little to dissuade an employer from engaging in the practice of discharging an employee for filing a workmen's compensation claim *** The imposition on the employer of the small additional obligation

> to pay a wrongfully discharged employee compensation would do little to discourage the practice of retaliatory discharge, which mocks the public policy of this State *** In the absence of other effective means of deterrence, punitive damages must be permitted *** (Kelsay v. Motorola, Inc. (1978), 74 Ill. 2d 172, 186-87.)

Applying this reasoning here, there is no reason to afford a tort remedy to at-will employees but to limit union members to contractual remedies under their collective-bargaining agreements. (Wyatt v. Jewel Cos. (1982), 108 Ill. App. 3d 840, 841-42.) Generally, if a union employee's grievance goes to arbitration and the arbitrator does not find just cause for the employee's discharge, the remedy will be simply job reinstatement and full back pay. (See Silzer, Workers' Compensation: Retaliatory Discharge of Employes Covered by a Collective Bargaining Agreement (1981), 70 Ill. B.J. 164, 166.) If there is no possibility that an employer can be liable in punitive damages, not only has the employee been afforded an incomplete remedy, but there is no

available sanction against a violator of an important public policy of this State. It would be unreasonable to immunize from punitive damages an employer who unjustly discharges a union employee, while allowing the imposition of punitive damages against an employer who unfairly terminates a nonunion employee. The public policy against retaliatory discharges applies with equal force in both situations. (That Illinois has a strong public policy to insure the protection of workers covered by the Workers' Compensation Act is clear. Section 6 of the Act (Ill. Rev. Stat. 1981, ch. 48, par. 138.6) requires employers to post printed notices containing information concerning the Act which is necessary to aid employees to safeguard their rights under the Act in the event of injury. Employers are required to file reports of injuries and other matters with the Commission, and the failure to do so constitutes a petty offense. Section 26 (Ill. Rev. Stat.

1981, ch. 48, par. 138.26) provides that in the event of any violation of the Act, which is declared to be a petty offense, the Attorney General and the State's Attorney of each county, upon the request of the Industrial Commission, shall enforce the penalties prescribed in the Act.)

The defendants argue that if union employees are allowed the tort action recognized in Kelsay, it would be violative of the Federal labor-law policy for industrial stability through the use of arbitration in union agreements. The argument is unconvincing. We cannot see any perceptible effect on the use of arbitration. There is an important public interest in protecting the rights of workers under the Act, and in deterring unscrupulous employers from discharging employees. The appellate court observed in Midgett:

> "[T]he recognition of a cause of action in tort merely allows an employee an additional remedy in areas where strong public

> policies, as opposed to purely private interests, are involved. Such an alternative is especially necessary and desirable in a case such as this where there has been an allegation of collusion between the union and the employer." Midgett v. Sackett-Chicago, Inc. (1983), 118 Ill. App. 3d 7, 9.

In light of defendants' argument regarding a Federal policy favoring arbitration, it is interesting to note that the Supreme Court has allowed employees, covered under a collective-bargaining agreement with an arbitration provision, to bring claims against employers that are founded upon violations of Federal statutory rights, such as violations of civil rights (McDonald v. City of West Branch (1984), ____ U.S. ____, 80 L. Ed. 2d 302, 104 S. Ct. 1799), racial discrimination (Alexander v. Gardner-Denver Co. (1974), 415 U.S. 36, 39 L. ed. 2d 147, 94 S. Ct. 1011), and violations of the Fair Labor Standards Act (Barrentine v. Arkansas-Best Freight System, Inc. (1981), 450 U.S. 782, 67 L. Ed. 2d 641, 101 S. Ct. 1437).

Sackett contends that Midgett's complaint was properly dismissed because he alleged no facts in his supporting affidavits, such as the exhaustion of grievance procedures, to sustain a cause of action. A plaintiff, however, need not plead the exhaustion of contract remedies to bring an action in tort. As was stated in Palmateer, the plaintiff must allege a retaliatory discharge and that the discharge violated a clear public policy. Midgett did this, and thus a cause of action was stated. Midgett, however, did not appeal the dismissal of his wife and children as plaintiffs. Those portions of the appellate and circuit court judgments dismissing them as party plaintiffs are, thus, to be left undisturbed.

John Repyak and his wife claim that, due to his discharge, they have an independent cause of action to recover his pension rights which were lost upon his discharge, which occurred one year and four months before they would have vested.

Their complaint, however, alleges that Repyak was discharged because he filed a workers' compensation claim and not because the employer wished to defeat his pension rights. The loss of pension rights would be a consequence of his discharge, and he may allege it as an element of damages in a retaliatory-discharge action against his employer.

Prestress, in cause No. 59350, filed a motion in this court to strike certain documents in Gonzalez' brief and the references to them, which motion was taken with the case. The documents in question were not made part of the record on appeal. Too, they were not before the trial court or the appellate court, and Prestress' motion to strike is allowed.

Midgett also filed a motion to strike portions of defendant Sackett's brief. This motion was also taken with the case. Midgett argues that those portions of the brief raise issues which were not raised in the trial court or in

the appellate court and that Sackett has waived those issues for review here. After reviewing Sackett's briefs, we have determined that Sackett did not earlier raise the issue of Federal preemption. We therefore allow Midgett's motion to strike as to the portion of the brief discussing this issue.

For the reasons given, the judgment of the appellate court in cause No. 59341 is affirmed; the judgment of the appellate court and the judgments of the circuit court of Livingston County in cause No. 59350 are reversed and the causes are remanded to the circuit court for proceedings consistent with this opinion.

59341 -- Judgment affirmed.
59350 -- Judgments reversed;
caused remanded.

JUSTICE MORAN, dissenting:

In Kelsay v. Motorola, Inc. (1978), 74 Ill. 2d 172, 181, this court found that an "employer's otherwise absolute power to terminate an employee at will should [not] prevail when that power is exercised to prevent the employee from asserting his statutory rights under the Workmen's Compensation Act." In recognizing the tort of retaliatory discharge, the court created what was to be a narrow exception to the general rule that "'at-will' employment is terminable at any time for any or no cause." (Palmateer v. International Harvester Co. (1981), 85 Ill. 2d 124, 128.) The court found this necessary to insure that at-will employees would be able to freely exercise their rights under the Workers' Compensation Act (Act) (Ill. Rev. Stat. 1981, ch. 48, par. 138.1 et seq.) without the risk of a retaliatory discharge by an employer against whom the employee had no recourse.

All of the plaintiffs in the consolidated

cases here under review were covered by collective-bargaining agreements containing grievance procedures for the determination of whether a discharge from employment was for just cause. Nevertheless, none of the plaintiffs utilized those procedures when pursuing their wrongful-discharge claims. All initially filed civil tort claims for retaliatory discharge against their employers. The majority opinion holds that an employee covered by a collective-bargaining agreement may bring "an action in tort, independent of any contract remedy." (Slip op. at 4.) In so doing, the court has turned the narrow exception of Kelsay into a general rule, applicable not only to at-will employees but also employees covered by a collective-bargaining agreement barring discharge of employees other than for just cause. As such, any employee, even if discharged for just cause, may now bring a civil action, sounding in tort, against his employer regardless of the fact that

he voluntarily agreed to be bound by a collective-bargaining agreement providing procedures for handling the grievances of discharged employees. Further, under the facts of the instant case, the employee may file his civil action without first exhausting, or even initiating, his contractual remedies pursuant to the grievance procedures set forth in the collective-bargaining agreement.

By extending the tort of retaliatory discharge in such a sweeping manner, today's opinion completely overlooks the specific policy consideration the court was confronted with when it recognized the tort of retaliatory discharge in Kelsay. In making the tort available to the at-will employee, the court, in Kelsay, provided a viable means for such employees to seek compensation under the Act without the threat that, in so doing, they would be sacrificing their job. The employee covered by a collective-bargaining agreement, requiring that just cause be

shown in order to discharge a covered employee, is not faced with the same dilemma. As the appellate court noted in Cook v. Caterpillar Tractor Co. (1980), 85 Ill. App. 3d 402, 405-06, "the concept of retaliatory discharge is subsumed within the just-cause provision and is within the power of the arbitrator to consider when determining if a discharge is for just cause." Clearly, a finding that an employee has been discharged in retaliation for claiming rights guaranteed under the Act would rule out a finding of a discharge for just cause. Thus, an employee covered by such an agreement may apply for benefits under the Act knowing that a discharge in retaliation for exercising such statutory rights could be vindicated by following the arbitration procedures provided for in the collective-bargaining agreement.

The majority states that allowing union employees the benefit of the tort of retaliatory discharge will not have "any perceptible effect

on the use of arbitration." (Slip op. at 5.) I cannot agree. As the appellate court in Cook correctly observed, "[t]o permit an employee to circumvent procedures mutually agreed upon for handling grievances by filing suit in the first instance would undermine the collective bargaining agreement." 85 Ill. App. 3d 402, 406.

In Republic Steel Corp. v. Maddox (1965), 379 U.S 650, 13 L. Ed. 2d 580, 85 S. Ct. 614, the Supreme Court reached the same conclusion when considering a situation wherein an employee covered by a collective-bargaining agreement brought a civil action against his employer for severance pay, without pursuing the grievance procedures outlined in his collective-bargaining agreement. In finding that the employee was barred from suing his employer for severance pay because of his failure to follow the grievance procedures, the court stated:

> "A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of

> a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.' [Citation.]" 379 U.S. 650, 653, 13 L. Ed 2d 580, 583-84, 85 S. Ct. 614, 616-17.

As the majority correctly observes, the Kelsay decision is significant in recognizing the importance of punitive damages as a deterrent to the offending employer. While I agree that an employer who unjustly discharges a union employee should not be immunized from punitive damages, I cannot agree that the expectations created by the collective-bargaining agreement should be entirely overlooked by allowing the union employee to completely circumvent the mutually agreed upon grievance procedures. Requiring union members to exhaust their contract remedies is part of the trade-off such

employees accept in exchange for the many rights that they benefit from--rights not enjoyed by the employee at will. As such, union employees alleging retaliatory discharge should only be allowed to pursue a civil action in very limited situations. Specifically, the discharged union employee should be allowed to pursue the civil tort action, as recognized in Kelsay, when he has followed the appropriate grievance procedures and the arbitrator has made a finding of retaliatory motivation. On the other hand, if the arbitrator finds that the employee has been discharged for just cause, the employee should be precluded from pursuing a civil action, absent the existence of extraordinary circumstances such as collusion between the union and the employer. (See Vaca v. Sipes (1967), 386 U.S. 171, 185, 17 L. Ed. 842, 855, 87 S. Ct. 903, 914.) However, bare allegations of collusion, without alleging facts to support such conclusion, are not sufficient to transform an

otherwise barred claim into an allowable civil action.

Plaintiff Midgett's claims of collusion were not included in his complaint. In its motion to dismiss Midgett's complaint, the defendant argued that the complaint failed to state a cause of action because Midgett did not pursue the administrative remedies he was bound to follow under the terms of the collective-bargaining agreement. In affidavits filed by Midgett, in support of his opposition to the motion to dismiss, he first alleged collusion and fraudulent misrepresentations by and between the union and the defendant employer. As such, he maintained that he was denied the opportunity to pursue his claim of retaliatory discharge through grievance procedures. These allegations, however, are merely conclusory statement, without supporting facts. Therefore, I find Midgett's claim of collusion insufficient to entitle him to institute a civil tort action

against his employer.

For the reasons stated above, I respectfully dissent from the majority opinion.

RYAN, C.J., and UNDERWOOD, J., join in this dissent.

FILED

OCT 10 1984

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OCT 27 1983
Clerk of the
Appellate Court,
4th Dist.

NOS. 4-83-0292, 4-83-0293 Cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JOSE ISABEL GONZALEZ, A., Plaintiff-Appellant, (4-83-0292) v. PRESTRESS ENGINEERING CORPORATION, an Illinois corporation, Defendant-Appellee.	)	Appeal from Circuit Court County of Livingston Nos. 82L37 and 82L43
JOHN REPYAK and ELSIE REPYAK, Plaintiffs-Appellants, (4-83-0293) v. PRESTRESS ENGINEERING CORPORATION, an Illinois corporation, Defendant-Appellee.	)	Honorable William T. Caisley, Judge Presiding.

JUSTICE GREEN delivered the order of the court:

Plaintiffs, Jose Isabel Gonzalez and John Repyak, filed suits in the circuit court of Livingston County alleging that they were dis-

charged by defendant, Prestress Engineering Corporation, in retaliation for exercising their rights under the Workers' Compensation Act (Ill. Rev. Stat. 1981, ch. 48, par. 138 et seq.) by filing claims with the Industrial Commission. In the case brought by John Repyak his wife Elsie joined as a plaintiff claiming that his discharge in retaliation, as above described, caused them to lose valuable pension rights. On March 31, 1983, the trial court allowed defendant's motions to dismiss brought pursuant to section 2-619 of the Code of Civil Procedure (Ill. Rev. Stat. 1981, ch. 110, par. 2-619). Plaintiffs have appealed and the cases have been consolidated on appeal.

The existence of a cause of action in an employee for being discharged in retaliation for exercise of rights under the Workers' Compensation Act was established in Kelsay v. Motorola, Inc. (1978), 74 Ill. 2d 172, 384 N.E.2d 353. The employee there was an employee at will

having no contractual rights as to continuity of employment. In Deatrick v. Funk Seeks International (1982), 109 Ill. App. 3d 998, 441 N.E.2d 669, we held that an employee covered by a collective bargaining agreement providing for a grievance procedure in connection with firings could not bring a common law action under the Kelsay doctrine, but was required to pursue the grievance procedures of the collective bargaining agreement. In the case on appeal, the substance of defendant's motion to dismiss was the affirmative allegation, supported by an uncontested affidavit, that plaintiffs Gonzalez and John Repyak were covered by such an agreement.

The parties do not dispute that the collective bargaining agreement (1) provided for a procedure whereby "[a]ll grievances [had to be] presented within five (5) working days from the date the event occurs which gives rise to the grievance," (2) defined a grievance as "a difference of opinion between the Company and an

employee covered by this Agreement with respect to the meaning and application of a term or terms of this Agreement," and (3) permitted the employer to discharge an employee only for "just cause." We conclude that the collective bargaining agreement required the application of the grievance procedure to determine if "just cause" to discharge existed here.

Plaintiffs request that we overrule Deatrick. In reaching that decision, this court followed the split decision of the appellate court for the Third District in Cook v. Caterpillar Tractor Co. (1980), 85 Ill. App. 3d 402, 407 N.E.2d 95. A contrary decision was reached by the appellate court for the First District in Wyatt v. Jewel Companies, Inc. (1982), 108 Ill. App. 3d 840, 439 N.E.2d 1053. The United States Circuit Court of Appeals chose to follow Cook rather than Wyatt in Lamb v. Briggs Manufacturing (7th Cir. 1983), 700 F.2d 1092. We need not restate the conflicting arguments on

this issue. We deem it appropriate to follow our recent decision in Deatrick.

Plaintiffs maintain that even if we do not overrule Deatrick, we should not require them to have used the grievance procedure here because the time frame for following that remedy, as provided in the collective bargaining agreement, is unreasonably short. Sections 2 and 3 of the agreement, considered together, provide that the worker shall present the grievance to the worker's immediate supervisor within five days of the occurrence of the event giving rise to the grievance. Here, that occurrence would be the discharge. The agreement further provides that if the grievance is not adjusted at that level the grievance must be placed in writing within an additional five-day period and attempts shall be made to adjust it between the union business agent and the local plant manager. In the event the dispute is not resolved, further procedures are then available.

Although the time span is extremely short for the handling of a grievance of the nature involved, this is the procedure agreed upon after collective bargaining. Even if the male plaintiffs were not members of the union representing the workers, they received the benefits of the collective bargaining agreement and are bound by its terms. Considering the foregoing, we do not determine the time span of the grievance procedure to be so unreasonably short as to be invalid. It is no shorter than that involved in Deatrick.

Plaintiffs Repyak claim that special consideration should be given to their case because John Repyak's discharge will cause him to lose valuable pension rights. He has alleged that he has eight and one-half years of seniority as an employee of defendant, but his pension rights will not vest until the completion of ten years of service. The discharge of an employee unfairly in order to avoid the payment of bonuses

or pensions has been held to give rise to a cause of action. (Fortune v. National Cash Register Co. (1977), 373 Mass. 96, 364 N.E.2d 1251.) Here, however, the allegation is not that John Repyak was discharged to defeat his pension rights, but that he was discharged because of his exercise of his rights under the Workers' Compensation Act. The loss of pension rights would be a consequence of the discharge and bear on damages, but would not be an element creating the cause of action for retaliatory discharge.

For the reasons stated, we affirm.

Affirmed.

MILLS and MILLER, JJ., concur.

STATE OF ILLINOIS) IN THE CIRCUIT
) SS COURT OF THE
COUNTY OF LIVINGSTON) ELEVENTH JUDICIAL
CIRCUIT

JOHN REPYAK AND
ELSIE REPYAK,
Plaintiffs

No. 82-L-43

vs.

PRE-STRESS ENGINEERING
CORPORATION, an Illinois
Corporation,
Defendant.

ORDER

This cause has come on for hearing upon motion of the defendant to dismiss the plaintiff's complaint pursuant to Section 2-619 of the Code of Civil Procedure. The arguments of counsel were heard and considered.

The court, being duly advised in the premises, doth find:

1. That the plaintiff was an employee of the defendant pursuant to the terms of a collective bargaining agreement which provided in Article VII,

Section 2 thereof, that all grievances must be presented within 5 working days from the date the event occurs which gives rise to the grievance;

2. That the plaintiff was discharged from the employment of the defendant, allegedly in retaliation for having filed a workman's compensation claim against the defendant; and

3. That the plaintiff failed to file a grievance arising out of the discharge.

The court finds, as a matter of law, that the cause of action stated in the plaintiff's complaint was barred by the plaintiff's failure to file a grievance pursuant to the contractual provisions of the collective bargaining agreement. Deatrick v. Funk Seeds International, 109 Ill. App. 3d 998, 441 N.E. 2d 669 (1982).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this cause of action be dismissed with prejudice, that the plaintiff take nothing

by his complaint, and that the plaintiff go hence without day.

/s/ William T. Caisley

JUDGE

DATED THIS 21st DAY OF MARCH, 1983

STATE OF ILLINOIS)
) SS
COUNTY OF LIVINGSTON)

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

JOSE ISABEL GONZALEZ, A.,
Plaintiff

No. 82-L-37

vs.

PRE-STRESS ENGINEERING CORPORATION, an Illinois Corporation,
Defendant.

ORDER

This cause has come on for hearing upon motion of the defendant to dismiss the plaintiff's complaint pursuant to Section 2-619 of the Code of Civil Procedure. The arguments of counsel were heard and considered.

The court, being duly advised in the premises, doth find:

1. That the plaintiff was an employee of the defendant pursuant to the terms of a collective bargaining agreement which provided in Article VII, Section 2 thereof, that all grievances

must be presented within 5 working days from the date the event occurs which gives rise to the grievance;

2. That the plaintiff was discharged from the employment of the defendant, allegedly in retaliation for having filed a workman's compensation claim against the defendant; and

3. That the plaintiff failed to file a grievance arising out of the discharge.

The court finds, as a matter of law, that the cause of action stated in the plaintiff's complaint was barred by the plaintiff's failure to file a grievance pursuant to the contractual provisions of the collective bargaining agreement. Deatrick v. Funks Seeds International, 109 Ill. App. 3d 998, 441 N.E. 2d 669 (1982).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this cause of action be dismissed with prejudice, that the plaintiff take nothing by his complaint, and that the plaintiff go

hence without day.

/s/ William T. Caisley

JUDGE

DATED THIS 21st DAY OF MARCH, 1983

A-53

No. 59350

(Consolidated)

No. 59341

IN THE
SUPREME COURT OF ILLINOIS

JOSE ISABEL GONZALEZ, A.,
Plaintiff-Appellant,

vs.

PRESTRESS ENGINEERING CORPORATION,
Defendant-Appellee.

JOHN REPYAK and ELSIE REPYAK,
Plaintiffs-Appellants,

vs.

PRESTRESS ENGINEERING CORPORATION,
Defendant-Appellee.

Appeal from the Appellate Court of Illinois,
Fourth District.

BRIEF OF DEFENDANT-APPELLEE

Julie Badel, Esq.
McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois 60603
(312) 372-2000
Attorney for Defendant-Appellee

Oral Argument Requested

* * *

C. STATE PUBLIC POLICY MUST BE TAILORED TO FEDERAL LABOR POLICY

Federal labor policy considerations mandate that an employee protected by a collective bargaining agreement exhaust the grievance procedure. Federal labor policy, as articulated by the Labor Management Relations Act of 1947, 29 U.S.C. §141 et seq., places a heavy reliance on contractual grievance procedures as the preferred means for resolving employee-employer disputes. Id. at §171(c), 173(d). In emphasizing the federal labor policy to promote industrial stability through the collective bargaining agreement and its arbitration provisions, the Supreme Court has commented that the collective bargaining agreement encompasses the entirety of the employment relationship. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-79 (1960). Aside from those mat-

ters which the parties specifically exclude, all disagreements come within the scope of the grievance and arbitration procedure. Id. at 581. Federal labor policy requires that employees at least attempt the use of the contractual grievance procedure agreed to by the union and the employer. At the minimum, the employee must allow the union the opportunity to act on his behalf. Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965).

To permit an employee to disregard the mutually agreed upon dispute resolving procedures in the collective bargaining agreement would undermine the status of the collective bargaining agreement, the union's role as exclusive bargaining representative, and nearly forty years of federal labor policy. As the court noted in Cook, "To permit these procedures to be circumvented in a situation where the employee is protected by the procedures is to invite strife unnecessarily. . . . [T]o expand the

tort of retaliatory discharge . . . is not only unnecessary, but counter-productive as well." 85 Ill. App. 3d at 406, 407 N.E. 2nd at 99. The seventh circuit found this ground "especially persuasive" in restricting a tort cause of action for retaliatory discharge to an employee at will and concluded that the contours of the public policy exception articulated in Kelsay should be tailored to accommodate other public policies, such as orderly industrial relations. Lamb v. Briggs Manufacturing Co., 700 F.2d 1092, 1096.

Extending the tort cause of action recognized in Kelsay to a union member, without any requirement that the employee pursue or exhaust the grievance procedure in the collective bargaining agreement, would emasculate the federal scheme for resolving labor disputes. Every discharged union employee who could invent an alleged public policy violation could bypass the grievance procedure completely and proceed imme-

diately to court with the attendant toll on court resources. The traditional functions of unions and labor arbitrators, along with their expertise in labor relations, would be appropriated by the courts. As a result, the grievance and arbitration procedure would become an extinct mechanism in discharge cases. in total contravention of federal labor policy. Federal labor policy can only be effectuated by requiring union employees to exhaust the grievance procedure.

However, precluding a tort cause of action by a union member protected by a just cause requirement for discharge, whether or not the employee has initiated or exhausted the grievance procedure, embodies the better rule of law for several reasons. First, a rule of total preclusion adheres to the legal distinction between an employee at will and an employee protected by a union contract by recognizing that no exception to the employment at will rule need

be created for the latter employee. Second, a rule of preclusion avoids the judicial extension of the Kelsay doctrine to union employees when no necessity for an extension exists. Finally, limiting a tort cause of action to an employee at will ensures compliance with state public policy underlying the Workers' Compensation Act without violating federal labor policy's emphasis on the grievance and arbitration procedure as a dispute resolving mechanism.

The employees in the instant case were not employed at will. Under the terms of the collective bargaining agreement, they could be discharged only for "just cause." Their alleged discharges in retaliation for filing workers' compensation claims could have been considered and resolved by a labor arbitrator under the just cause requirement in the collective bargaining agreement. Allowing them an alternate remedy of a tort cause of action would seriously undermine federal labor policy's reliance on the

grievance and arbitration mechanism for resolving disputes. According to the dictates of Kelsay, no tort cause of action need be or should be created for these employees.

* * *

Nos. 4-83-0292, 4-83-0293, Consolidated

In the
Appellate Court of Illinois
Fourth Judicial District

JOSE ISABEL GONZALEZ,
Plaintiff-Appellant,

vs.

PRESTRESS ENGINEERING CORPORATION,
Defendant-Appellee.

JOHN REPYAK,
Plaintiffs-Appellant,

vs.

PRESTRESS ENGINEERING CORPORATION,
Defendant-Appellee.

Appeals from the Circuit Court of Livingston County,
Illinois,
The Honorable William T. Caisley, Judge Presiding

BRIEF OF DEFENDANT-APPELLEE, PRESTRESS ENGINEERING CORPORATION

Julie Badel, Esq.
McDermott, Will & Emery
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Chicago, Illinois 60603
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Attorney for Defendant-Appellee

Oral Argument Requested

* * *

B. FEDERAL LABOR POLICY CONSIDERATIONS MANDATE AN EXHAUSTION REQUIREMENT

Permitting the plaintiffs to file suit without exhausting the arbitration procedure also would undermine federal labor policy which relies on the grievance and arbitration procedure to promote industrial stability. Cook v. Caterpillar Tractor Co., 85 Ill. App. 3d at 406, 407 N.E.2d at 99. Accord, Lamb v. Briggs Manufacturing, 700 F.2d 1092 (7th Cir. 1983). The Supreme Court has described arbitration as "the substitute for industrial strife." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960). The grievance and arbitration machinery constitutes the essence of a system of self-government, and the grievance and arbitration provisions encompass all questions, except those specifically excluded by the parties. All doubts are resolved in favor of coverage. Id. at 581.

Allowing an employee to bypass the grievance procedure in favor of a court suit diminishes the union's status as exclusive bargaining representative and the status of the grievance procedure as a mechanism for resolving disputes. Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965). This national policy favoring collective bargaining is embodied in the National Labor Relations Act, 29 U.S.C. §151.5/

Only by requiring a union member to exhaust the arbitration procedures in his collective

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5/ Section 151 provides, in part:
It is declared to be the policy of the United States to eliminate the cause of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. §151.

bargaining agreement can federal labor policy, which revolves around collective bargaining and arbitration, be effectuated. As the court observed in Cook, "To permit these procedures to be circumvented in a situation where the employee is protected by the procedures is to invite strife unnecessarily." 85 Ill. App. 3d at 406, 407 N.E.2d at 99. Expanding the tort of retaliatory discharge would be unnecessary and counter-productive.

The Seventh Circuit also relied heavily on federal labor policy considerations in Lamb. The court stressed that the contours of the general public policy exception to the employment at will doctrine, announced by the Illinois Supreme Court in Kelsay, surely must be "tailored so as not to obliterate other 'public policies' of the state, such as the protection of orderly industrial relations." Lamb, 700 F.2d at 1095. Thus, only the approaches adopted by the courts in Cook and Lamb accommodate both

state public policy prohibiting retaliatory discharge and federal labor policy's reliance on the arbitration process.

* * *

STATUTES

LABOR-MANAGEMENT RELATIONS ACT

§141. Short title; Congressional declaration of purpose and policy

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of

both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. §141.

§151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or

obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the

purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in

such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. §151.

§171. Declaration of purpose and policy

It is the policy of the United States that--

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual

agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

* * *

29 U.S.C. § 171.

§ 173. Functions of Service

* * *

(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

29 U.S.C. § 173.

§185. Suits by and against labor organizations
Venue, amount and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

29 U.S.C. § 185

Office - Supreme Court, U.S.
FILED
JUN 3 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1705

In The

Supreme Court of the United States

October Term, 1984

PRESTRESS ENGINEERING CORPORATION,

Petitioner,

v.

JOSE ISABEL GONZALEZ and JOHN REPYAK,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

RESPONDENTS' BRIEF IN OPPOSITION

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May 30, 1985

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4. A TORT THEORY OF RECOVERY ALLOWS A FULL RANGE OF DAMAGES TO AN INJURED PARTY, WHERE A CONTRACT THEORY OF RECOVERY PROVIDES ONLY LIMITED DAMAGES. 16

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QUESTION PRESENTED FOR REVIEW

1. The issue is whether an employee covered by a collective bargaining agreement can maintain a private action for damages caused by a wrongful discharge when the act of discharge violates a stated public policy of the State of Illinois, or is such an employee absolutely restricted to contract remedies by and through the grievance and arbitration procedure of the collective bargaining contract.

STATEMENT OF THE CASE

The case involves the right of an individual to prosecute an action for retaliatory discharge against a former employer. The plaintiff claims the discharge was motivated by the employer's attempt at retribution against the individual because the employee filed an application for benefits under the Illinois Workers' Compensation Act. Any attempt at such retribution is strictly forbidden by the Workers' Compensation Act, but such act of discharge is sanctioned only by a statement in the Act that an employer doing such acts shall be deemed to be acting "unlawfully".

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RULE 28.1 STATEMENT

Plaintiffs Jose Isabel Gonzalez, and John Repyak and Elsie Repyak are individuals and have no connection with any corporation, subsidiaries, or affiliates. Plaintiffs are former members of Local Laborer's Union 996, North Central Illinois Labor's Council, with affiliated pension plan being the Laborers' International Union of North America National (Industrial) Pension Fund, Washington, D.C. Plaintiffs have an unvested interest in the pension plan in the form of "pension credits", a unique non-marketable interest in the pension plan assets.

OPINIONS BELOW

Respondents herein adopt the reprint of the opinions contained in the Petition for Writ of Certiorari.

JURISDICTION

Jurisdiction of the Court invoked under 28 U.S.C. 1257(3) appears to be improper inasmuch as Respondent views this case as one not involving a Federal Statute; only a State of Illinois statute is involved, indirectly, which statute does not interfere or conflict with any Federal Statute in any way.

STATUTES INVOLVED

No statutes of the United States are involved and only a particular statute of the Illinois Workers' Compensation Act is involved,section 138.4(h), Chapter 48, Illinois

Revised Statutes, which is reproduced in the Appendix, p. A-18.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-

Prestress Engineering Corporation,
Petitioner

v

Jose Isabel Gonzalez and John Repyak and Elsie Repyak,
Respondents

On Petition for a Writ of Certiorari to the

Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

The Respondents, Jose I. Gonzalez, and John and Elsie Repayk, by their attorney, Emmanuel F. Guyon, respectfully request that this Court deny the petition for Writ of Certiorari directed to the Supreme Court of Illinois in this case. That opinion is report-

ed as "Midgett v Sackett-Chicago, Inc.", and "Gonzalez, et. al. v Prestress Engineering Corp.," Nos. 59341, 59350, 15 Ill Dec 475, 413 NE 2d 1280, 105 Ill 2d 143.

STATEMENT OF FACTS

The Statement of Facts recited in the Illinois Supreme Court opinion is correct. The only additional statement of importance is that Plaintiff John Repyak was awarded benefits in July, 1981, as noted in the case. Respondent-Defendant Prestress Engineering Corporation appealed the decision to the Full Industrial Commission, which affirmed the decision of the Arbitrator, and further increased the award of benefits to John Repyak. The decision issued on September 16, 1982; the award was paid on November 1, 1982; Plaintiff was discharged in the intervening time, in October, 1982, which act is contended to be

directly and causally related to receipt of the worker's compensation benefit award.

REASONS WHY THE WRIT SHOULD BE DENIED

1. FEDERAL LABOR LAW IS AN ISSUE WHEN A CONTROVERSY EXISTS BETWEEN MANAGEMENT (EMPLOYER) AND THE UNION (ALL EMPLOYEES); THERE IS NO QUESTION OF FEDERAL LABOR LAW WHERE AN INDIVIDUAL EMPLOYEE ASSERTS A PRIVATE CAUSE OF ACTION AGAINST AN EMPLOYER.

An employee is a beneficiary of a union-management contract governing the rights of employees in the on-going relationship with management in an industrial setting. A collective bargaining agreement ".....is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate." United Steelworkers of America v Warrior Gulf and Navigation Co., 363 U.S. 574, 4 L Ed 2d 1409, 80 S. Ct. 1347 (1960). There is a developing Federal common law grounded in national labor policy. This

law contemplates the respective positions of management on one hand, and the union on the other. The Union acts as the employee's exclusive representative in the grievance procedure, as it does in all matters involving the terms and conditions of employment. The Union has the exclusive right and power to speak for a group of employees, and correspondingly assumes a duty to discharge that duty faithfully. Bowen v U.S. Postal Service, ___ U.S. ___, 74 L Ed 2d 402, 103 S. Ct. ___. In the instant case, the plaintiff is not the union; the union is not even in the proceedings. Here the plaintiffs are single individuals, each with a cause of action accruing in their favor based on an act alleged to be violative of the public policy of the State of Illinois. The act of termination in retaliation for the filing of worker's compensation claims affects only that individual, not the entire group of

employees represented by the union. After termination, each of the individuals here are not even members of the union, and the union has no further responsibility for the welfare of the employees. The case before this court does not represent any facet of Federal common-law of labor policy; rather, this case represents the effort of a single individual asserting a private cause of action against a wrongdoer, the latter being the Employer. The developing common law of Federal labor policy is not touched by any facet of this case.

2. AN ACTION FOR CLAIMED WRONGFUL DISCHARGE, VIOLATIVE OF THE PUBLIC POLICY OF THE STATE OF ILLINOIS, IS A PRIVATE CAUSE OF ACTION THAT BELONGS TO THE INDIVIDUAL, AND SUCH ACTION IS ALLOWED TO BE BASED ON A TORT THEORY OR A CONTRACT THEORY OF RECOVERY.

The Supreme Court of Illinois ruled the victim of retaliatory discharge must be given an action in tort, independent of any contract

remedy the employee may have based on the collective bargaining agreement. In order to give an employee a complete remedy against a wrongdoing employer, the sanction of punitive damages must be allowed to protect the important public policy of the State of Illinois--the right to file a claim for benefits under the Worker's Compensation Act without fear of retribution for such filing, including inter alia, the loss of employment. The sanction contained in the statute, section 26, chapter 48 (paragraph 138.26), Illinois Revised Statutes 1981, provides only that a violation of the Act is held to be a petty offense, certainly not enough of a penalty to deter wrongdoers. The remedy afforded by a common law action, which allows punitive damages as well as compensatory damages, is awarded to the victim, not the union or the group of employees represented by the collective bargaining

agreement. Because the victim is awarded damages, it can only be categorized as a private cause of action, not affecting the Federal common law of labor policy. No national interest is affected by a ruling in this case, whether the ruling be for the plaintiff or for the defendant.

3. UNION EMPLOYEES, AND NON-UNION EMPLOYEES ARE ACCORDED FEDERAL STATUTORY RIGHTS THAT CAN BE VINDICATED THROUGH PRIVATE CAUSES OF ACTION.

The opinion of the Supreme Court of Illinois referred to the Defendant's argument of Federal labor policy favoring arbitration, but rejected it squarely, noting that the U.S. Supreme Court has allowed employees covered under collective-bargaining agreements with an arbitration provision to bring claims against employers founded on violations of Federal Statutory rights. Examples of such actions are civil rights violations (McDonald v City

of West Branch (1984) ___ U.S. ___, 104 S. Ct. 1799, 80 L Ed 2d 302), racial discrimination (Alexander v Gardner-Denver Co. (1974), 415 U.S. 36, 94 S. Ct. 1011, 39 L Ed 2d 147), and violation of the Fair Labor Standards Act (Barrentine v Arkansas-Best Freight Systems, Inc., (1981), 450 U.S. 728, 101 S. Ct. 1437, 67 L Ed 2d 641). In each case the successful plaintiff prosecuted a private right of action outside the constraints of the collective-bargaining remedies before bringing the individual cause of action by and through the Federal Statutes referred above. A claim for retaliatory discharge is unique to the individual, and is a private cause of action best resolved by a court proceeding involving only that individual, and the wrongdoer Employer.

4. A TORT THEORY OF RECOVERY ALLOWS A FULL RANGE OF DAMAGES TO AN INJURED PARTY, WHERE A CONTRACT THEORY OF RECOVERY PROVIDES ONLY LIMITED DAMAGES.

The Supreme Court of Illinois held in its opinion that punitive damages could be recovered in a retaliatory discharge action. Punitive damages are recoverable, in addition to the base compensatory damages, because the court wanted to provide a complete remedy to a victim of retaliatory discharge. If a union employee initiates the arbitral proce s, with the arbitrator finding for the victim, the remedy will likely be only job reinstatement and back pay (See Silzer, "Workers' Compensation: Retaliatory Discharge of Employees Covered by a Collective Bargaining Agreement" (1981) 70 Ill, Bar Journal 164). Additionally, the deterrent effect manifests itself only if punitive damages are available to the victim, which principle was implicitly recognized in

the ruling by the express holding of the court. Without the punitive damages option no meaningful sanction can be imposed against a wrongdoer. The type of recovery authorized by the Court is more suitably categorized as a private recovery, belonging to an individual, rather than a group of employees such as a Union.

CONCLUSION

The Petitioners have not demonstrated that review of the decision of the Supreme Court of Illinois is warranted; for these reasons the petition for a writ of certiorari should be denied.

Respectfully Submitted,

JOSE ISABEL GONZALEZ and
JOHN REPAYK & ELSIE REPYAK,
Plaintiffs-Respondents

by: Emanuel F. Guyon
Emmanuel F. Guyon,
Their Attorney

APPENDIX

Statutes to be Construed

Illinois Revised Statutes, chapter 48, section:

138.4(h)

> "(h) It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights or remedies granted to him by this Act or to discriminate, attempt to discriminate, or threaten to discriminate against an employee in any way because of his exercise of the rights or remedies granted to him by this Act.
>
> It shall be unlawful for any employer, individually or through any insurance company or service or adjustment company, to discharge or to threaten to discharge, or to refuse or rehire or recall to active service in a suitable capacity an employee because of the exercise of his rights or remedies granted to him by this Act."

138.26

> "Any wilful neglect, refusal, or failure to do the things required to be done by any section, clause or provision of this Act, on the part of the person herein required to do them, or any violation of the provisions....., is a petty offense."

No. 84-1705

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Prestress Engineering Corporation,
Petitioner

v

Jose Isabel Gonzalez and John Repyak,
Respondents

RESPONDENT'S BRIEF IN OPPOSITION ON
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

PROOF OF SERVICE

I, EMMANUEL F. GUYON, being a member of the Bar of this Court do hereby certify that on May 30, 1985, pursuant to United States Supreme Court Rule 19.3, I served notice of the date of filing and of the docket number of this cause on a form supplied by the Clerk of this Court, by depositing said notice in a United States mailbox at Streator, Illinois,

with first-class postage prepaid and addressed to the following counsel who represent all parties required to be served:

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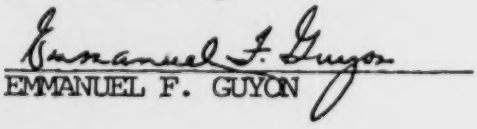

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